

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5107 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

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MV CHAUHAN

Versus

STATE OF GUJARAT

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Appearance:

MR ANAND L SHARMA for Petitioner

M/S PATEL ADVOCATES for Respondent No. 1

MR SP HASURKAR for Respondent No. 3

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CORAM : MR.JUSTICE R.BALIA.

Date of decision: 07/10/1999

ORAL JUDGEMENT

1. While petitioner was serving as a Divisional Accountant a Class III post in the Medium Irrigation Project Division of Ankleshwar, a case under Prevention of Corruption Act, 1947 read with section 161 IPC was instituted against him before the learned Special Judge, Bharuch. During the pendency of the trial, he was suspended on 23rd January 1985. In the said trial, in

the first instance, he was convicted by the Judge, Special Court and thereafter, the said conviction was upheld by High Court in Criminal Appeal No.1189/86 by judgement dated 16/17-4-1993. His appeal before the Supreme Court succeeded on 3/9/1997 and he was acquitted and conviction was set aside on the ground that no valid sanction for prosecuting has been granted by the Government. However, the Court looking to the age of litigation and issue involved did not permit trial denovo in respect of the charges. During this period, the petitioner has attained the age of superannuation and retired from services on 30th April 1994. During the entire period of his tenure w.e.f. 23rd January 1985 to 30th April 1994, the petitioner has remained under suspension. As a result of setting aside of conviction, the suspension of petitioner was revoked. The Government also decided not to take any departmental action against the petitioner and consequential benefits were computed by treating him on duty throughout the period during which he remained under suspension. The petitioner was also afforded promotion as and when it became due to him by giving him deemed date as on the date person who were junior to him was promoted on the next higher post. He was given promotions on the posts of Assistant Office Superintendent [DN] and Assistant Office Superintendent [Circle] w.e.f. 10/3/1980 and 28/12/1984 respectively. Lastly, he was given promotion as office superintendent w.e.f. 23/5/89. However, no emoluments were granted to the petitioner for 23/5/1989 to 10/3/1980 and 30/4/1994, the period covering his promotion as Office Superintendent by order dated 6th March, 1998. It is this action which is the subject matter of challenge in this petition.

2. It has been urged by learned counsel for the petitioner that in fact, no orders were made denying petitioner the emoluments for period of suspension and in fact all other emoluments except for the higher post of office superintendent has been paid. The petitioner cannot be denied entitlement of higher post of which he was denied opportunity at appropriate time for no fault of his. If the denial of pay of promotional posts for the period is relatable to Rule 152 of B.C.S.R., the same could not have been made without affording opportunity of hearing. In that event, the impugned order has been made without affording an opportunity of hearing and therefore, it suffers from breach of principle of natural justice and cannot be sustained. He also pointed out that the Government in its own decision has taken the view that where a person who has been prosecuted and convicted, on being acquitted on technical ground and no

further appeal is filed against such acquittal on technical ground that that the Government also decided not to take any action against the petitioner, such acquittal should be deemed to be an acquittal on merit and as a consequence thereof, he is entitled to full benefit as having been reinstated as a result of clean acquittal.

3. Learned counsel for the respondents supports the order of denial of emoluments of higher post solely on the ground of Rule 152 of B.C.S.R. He contends that the purport of its circular is confined only for the purpose of grant of promotion, but does not affect making of an order under Rule 152 of B.C.S.R. Rules which is to be made in such eventuality. As in the present case under the provision of the Act governing the regularisation and payment of the period during which government servant has not discharged his duties as a result of suspension or dismissal order and ultimately, he is restored back to his original position. So far as the question of order having been made in breach of principles of natural justice is concerned, it is not disputed that the order has been made in breach of principles of natural justice.

On respondents own showing the order denying emoluments for suspension period cannot be sustained, if the same has been made in breach of principle of natural justice, and this is admitted position in present case, that orders has been made in breach of natural justice, the impugned action is liable to be set aside.

4. Rule 152 of the B.C.S.R. relevant for the present purpose reads as under :-

"152. [1] When a Government servant who has been dismissed, removed or suspended is reinstated, the authority competent to or the reinstatement shall consider and make a specific order -

[a] regarding the pay and allowances to be paid to the government servant for the period of his absence from duty; and

[b] whether or not the said period shall be treated as a period spent on duty.

[2] Where the authority mentioned in sub-rule [1] is of opinion that the government servant has been fully exonerated or in

the case of suspension that it was wholly unjustified the government servant shall be given the full pay and allowances to which he would have been entitled had he not been dismissed, removed or suspended, as the case may be.

[3] In other case, the government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe :

Provided that the payment of allowances under clause [2] or [3] shall be subject to all other conditions under which such allowances are admissible.

[4] In a case falling under clause [2] the period of absence from duty shall be treated as a period spent on duty for all purposes.

[5] In case falling under clause [3] the period of absence from duty shall not be treated as a period spent on duty unless such competent authority specifically directs that it shall be so treated for any specified purpose. "

A perusal of the rule discloses the scheme that when a person has been absent from duty either as a result of dismissal, removal or on being suspended is reinstated, the consequence of regularization of period of such absence from duty and payment of emoluments full or in addition to the subsistence allowance does not follow automatically, but requires order to be made separately in respect of two matters, firstly whether the period under consideration is to be treated as a period spent on duty or not and secondly, regarding the pay and allowance to be paid to the Government servant for the period of his absence from duty. That emanates from sub-rule [1]. Then envisaging distinction between the quality of reinstatement, the rule further provided guidelines for exercising of authority for the purpose of sub-rule [1]. Sub-rule [2] envisages where the Competent Authority is of the opinion that the government servant has been fully exonerated or in the case of suspension, it was wholly unjustified, he would have been entitled to full pay and allowances had he not been dismissed or suspended as the case may be. Sub-rule [3] envisages

that in other case not falling in sub rule [2], the government servant shall be given such proportion of pay and allowances as the competent authority may prescribe. Rule also provides that the payment of allowance under clause [2] or [3] to be subject to all other conditions to which such allowances are admissible. Thus, providing for the pay and allowances to be paid for the period in question, namely in the case of full exoneration or a suspension wholly justified, the full pay and allowance in other cases as per the orders made by the competent authority, the provisions in sub-rule [4] and [5] relate the question of period of absence from duty to be treated as a period spent on duty or not. Where a case falls in sub-rule [2], the entire period of absence from duty is to be treated as a period spent on duty for all purposes. That is to say, treatment of entire period of absence from duty as a period spent on duty for all purposes without adjusting against available leave of any kind, is related to grant of full pay and allowances for the period of absence from duty. Sub-rule [5] governs the case of treatment of period of absence from duty in cases not governed by sub-rule [2]. As against treating that period automatically as a period spent on duty, u/s [4] read with rule [2], it envisaged specific order to be made in that regard. A specific order is required to be made to specify for the purpose for which it is to be treated on duty and for the purpose for which it is not to be treated on duty. Sub-rule [4] and sub-rule [5] makes two things amply clear. Where the period of absence is treated as a period spent on duty for all purposes, the payment of full pay and allowance for such period follows, or where sub-rule [2] operates, a specific order for treating the period of absence to be period on duty is not necessary. It follows as a matter of natural consequence. In other words, for the purpose of pay and allowances, scheme of rules intertwines the period of absence treated as period spent on duty for all the purposes which carries full pay and allowances. Sub-rule [3] and sub-rule [5] constitute part of same scheme, where the emoluments are to be paid in proportion as the competent authority may prescribe. This has obviously reference to the proportion between the period of absence from duty which has been treated as on duty and the period which has not been treated as spent on duty, but is adjusted against leave etc. There may be a case where period though treated as spent on duty for some specified purpose only, but not for the purpose of emoluments. There is no dispute and law is settled by a pronouncement of the Division Bench of this Court in case of Ramsunder Shamlal v/s Y.B.Jhala or his successor reported in 1999[1] GLH 150 that whenever an order is

required to be made under sub-rule [3], as it affects the right of civil servant adversely, it is to be made in consonance with the principles of natural justice by affording the incumbent an opportunity of hearing before making such order, curtailing the emoluments or impinging in regularization of the period of absence from duty by not treating it fully or for all purpose to be on duty.

4. In this connection, it will also be apposite to notice that expression 'fully exonerated' in the case where a person is being tried on a criminal charges and is acquitted requires consideration of the nature of acquittal. The government in its wisdom for maintaining uniformity has issued guidelines relevant for the present purpose that in what circumstances an acquittal on technical ground can be treated equivalent to acquittal on merit. The resolution of the government dated 2nd April 1983, clause [5] reads that :-

"Where the acquittal by court is on technical grounds, and if the government does not propose to go in appeal to a higher court or to take further departmental action, action should be taken in the same manner as if the official has been acquitted by the court on merits."

At least there is no dispute for the purpose of promotion, the acquittal in such event is treated to be a 'full exoneration' and acquittal not merely on technical grounds.

6. The facts which requires to be noticed at this stage are that in consequence of acquittal of the petitioner vide judgement of the Supreme Court dated 3rd September 1997, by its order dated 22nd December 1997, respondents have promoted the petitioner to the post in question in consonance with the said resolution. The order of promotion reveals the consideration that the Supreme Court by its order dated 3rd September 1997 has declared the incumbent innocent which the State Government accepts and it has decided not to take any departmental action in respect of those charges as well. With these orders, it also directed that the entire period of absence from duty during suspension upto the date of retirement is to be treated as the period spent on duty uninhibitedly. The purpose for which such period is to be treated on duty was not restricted to any specified purpose. Once an uninhibited order of treating the entire period of absence from duty as spent on duty is made, the consequence must follow, as envisaged in the

scheme of Rule 152, in entitling full pay and allowance to the incumbent as in case of period of absence from duty is deemed to be spent on duty for all purpose.

This is apart from the fact that, after this order has been made, the petitioner has been considered for consequential benefits which included consideration for promotion at different intervals as and when person junior to him were considered and promoted and the petitioner was given benefit of such promotions from anterior date by treating it to be a case of clean acquittal on merits.

7. The two things taken together, I am of the opinion that there cannot be any other conclusion possible that in the facts and circumstances of the present case, sub-rule [2] read with sub-rule [4] and [5] of rule 152 operate else the entire scheme would be incongruous, inasmuch as while regularizing the period of absence from duty, the Government decides to treat the entire period uninhibitedly as a period spent on duty without restricting it for any specified purpose and then they seek to restrict its operation when it comes to make payment of pay and allowances of higher post. It may be noticed that sub-rule [3], where it operates, requires the determination of proportionate pay. Expression 'proportionate pay' can only refer to the in proportion to which period of absence of duty is directed to be spent on duty for the purpose of pay and allowance. Otherwise expressing 'proportionate' is not relatable to any other consideration. No specific order was ever made while ordering treating the entire period of absence from duty as spent on duty, by specifying purpose for which such order was deemed to operate. It was not necessary to make such order to give effect to promotion. That can be granted even by regularising period of absence by sanctioning any kind of leave. By not operation of treating the period spent on duty to any specified purpose, the same cannot be read implicitly restrictive. Once the entire period of absence is treated to be spent on duty, emolument for the period spent on duty must follow. In such event, even the question of considering the justification of suspension independently will not be needed. If the order of suspension was to be treated as not wholly unjustified, then there cannot be unrestricted treatment of period of absence as spent on duty. That will be contradictory in terms.

8. As in my opinion, the reading of the scheme makes petitioner entitled to the relief claimed by him clearly it would be not desirable now merely to set aside the

order on the ground of breach of principles of natural justice and direct to redetermine the issue again and leave the future prospects of litigation open. This is so far as sustainability of respondents is concerned.

9. The petitioner is entitled to succeed in this case on the facts of this case itself. It has been the case of the petitioner, and which is not in dispute, that except for the emoluments of the post of Office Superintendent for the period between 23/5/89 to 30/4/94 all other benefits including full pay and allowance of the post which the petitioner held at the time of suspension has been paid. Truly speaking, it is not a case of inviting application of Rule 152 at all. Once full pay and allowances of the post held at the time of dismissal or suspension has been released in full by treating the period of absence as period spent on duty, the operation of Rule 152 is complete. Thereafter, the question really concerns about consequential benefits of such reinstatement. It is not envisaged under Rule 152 to treat the entire period of absence from duty to be divided between the post originally held and the promotions to which he would have been entitled during that period had such dismissal or suspension not taken place. If the emoluments of original post is denied, the benefit of emoluments of higher post may not become payable automatically but such promotion may remain notional for the purpose of consequences of pay and allowances of such higher post. Once full pay and allowance of the post held at the time of dismissal or suspension is released, the denial of emoluments of higher post cannot be related to act of absence from duty. It follows the payment on original post. The full payment of emoluments of original post and full payment of promotion to higher post by treating the acquittal on merit and by dropping departmental enquiry is accepted position. The consequence of full pay and allowances of higher post must follow the full payment of original or lower post. It cannot be that while petitioner is entitled to full emoluments of post from which he was suspended but is denied emoluments of higher post which follows. The government resolution with reference to which promotions have been made with effect from date person junior to incumbent has been provided does not make any distinction in the matter of emoluments payable on clean acquittal as such or acquitted deemed to be on merit for the purpose of promotion. The promotion in either case is at par. The principle in such circumstances squarely governed is ratio laid down in Union of India v/s K.V. Jankiraman [1991] 4 SCC 109 wherein the apex Court said,



"When an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post alongwith the other benefits from the date on which he would have normally been promoted, but for the disciplinary / criminal proceedings. This cannot be denied on the principle of 'no work no pay'. The normal rule of 'no work no pay' is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him."

10. The petitioner's case on being promoted on the basis of acquittal on merit for the purpose of monetary benefits falls within the four corners of aforesaid principle. Thus, the petitioner is entitled to full pay and emoluments on being promoted to next higher post when he became due to be so promoted, but for his suspension. Principle of 'no work no pay' cannot support the denial of full pay and allowances of higher post in such circumstances, which is because of own fault of respondents and deemed date is given as remedial measure.

11. As a result, this petition is allowed. The impugned order dated 6th March 1998 is set aside to the extent it denies the payment of full pay and allowances due for the period from 25th March 1989 to 30th April 1994 on the post to which the petitioner has been granted promotion with retrospective effect, but has been denied payment of the post for that period. The respondents shall determine the amount so payable within a period of two months from the date of receipt of writ. The petitioner's fixation of pension should also be finalized, if it has not already been finalized, as early as possible within the aforesaid period.

Rule made absolute. No orders as to costs.

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